

A Model Bill Allowing Choice Between Auto Insurance Payable With and Without Regard to Fault

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with commentary coauthored by Robert Joost**

Good auto insurance reform laws that call for payment of traffic victims' economic losses without regard to fault and, in turn, prevent most traffic accident victims from litigating their claims based on fault for both economic and noneconomic losses (pain and suffering) offer the most effective means of containing inflation in auto insurance costs. On the other hand, Ralph Nader and other influential consumer advocates believe it is unfair to curtail the right of innocent traffic victims to claim for their pain and suffering.¹ Obviously, too, powerful trial lawyers' lobbies which have too often sabotaged no-fault statutes in many states bitterly oppose good no-fault laws.²

When auto insurance reforms calling for payment without regard to fault were initiated in the late 1960s and early 1970s, they were hailed as a means of assuring limited, but prompt, payment for accident victims at low cost. Injured victims could claim for their medical expenses and lost wages from their own insurance companies, without having to prove who was at fault in the accident. On the other hand, where the victim could show that his or her injuries were severe he or she was allowed to sue the other driver.

Study after study has shown that no-fault does deliver compensation much more promptly and effectively than tort litigation.³ Unfortunately, however, there is reason to believe that no-fault actually subsidizes Americans' tort claims.

In some states no-fault was simply "added on" to the liability system, guaranteeing minimum benefits to everyone without restraining their ability to sue

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In the drafting of the bill and its commentary, I have been greatly aided by the advice of too many to enumerate individually, including representatives of consumer groups, government, and insurance companies. I should, though, mention the help of my colleague Robert Joost of the Washington, D.C. bar, in reviewing this manuscript and in originally proposing a "consumer choice" model for automobile insurance (*see infra* note 3). In addition, Robert Joost is the coauthor of the commentary to the bill beginning at footnote 12.

I owe a debt of thanks to my able research assistants, University of Virginia law students Timothy Spong, class of 1991, and Thomas Shambaugh, class of 1992.

A slightly different version of the bill was on the statewide ballot by initiative in Arizona in 1990. It lost.

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1. Passell, *Selling No-Fault Auto Insurance*, N.Y. Times, Nov. 23, 1988, at D2, cols. 1-3.

2. *Id.*

3. For a description of the inadequacy of the common law of torts as applied to auto accidents and the improvements wrought by systems payable without regard to fault, see U.S. Dep't of Transp., *Compensating Auto Accident Victims: A Follow-Up Report on No-Fault Auto Insurance Experiences* (1985) [hereinafter DOT Report]. (For a summary of the DOT Report, see O'Connell & Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61, 63-75 (1986) [hereinafter cited as O'Connell & Joost]); *see also* ALL INDUSTRY RESEARCH ADVISORY COUNCIL (AIRAC), *COMPENSATION FOR AUTOMOBILE INJURIES IN THE UNITED STATES*, 8-14 (1989) [hereinafter cited as AIRAC].

for more. Obviously such "add-on" laws, by not taking anything away from consumers, but tacking on additional benefits, were bound to be costly.⁴

But even in states with thresholds (requiring victims to incur a given level of medical bills or even "serious or permanent" injury before they could pursue a claim based on fault), costs were reduced less than anticipated. By guaranteeing no-fault benefits up front many victims who formerly might have been prompted to settle relatively quickly for relatively little in order to pay medical bills or replace wage loss are much more aggressive in pursuit of their claims based on fault—with a resultant further increase in the cost of already expensive liability insurance.⁵

Is there a solution to this dilemma of preserving the right of those who wish to sue for pain and suffering without such sweeping subsidization of tort litigation? The answer is to give consumers the right to buy either liability insurance *or* a new form of auto insurance called personal protection coverage, payable for economic loss without regard to fault.⁶

A pivotal requirement of any law allowing motorists to choose between coverages payable with and without regard to fault is the proper allocation of benefits from surrender of tort rights.

To illustrate the problem, consider the impact of the possible combinations of insurance coverages in a two-car collision when a state offers automobile insurance payable either with or without regard to fault: (1) both vehicles could be covered by insurance payable without regard to fault; (2) both vehicles could be covered by insurance payable with regard to fault; or (3) one vehicle could be covered by insurance payable without regard to fault and the other by insurance payable with regard to fault.

Resolving claims and transferring accident losses is easy for the first two coverage combinations. If two motorists with insurance payable without regard to fault collide, they would recover under their respective personal protection (no-fault) policies without bringing a common law claim based on fault against each other. If two motorists insured under traditional insurance payable with regard to fault collide, they could claim against each other based on fault as they do under common law rules. But resolving claims and transferring losses is problematic for the third combination, a collision between motorists insured with and without regard to fault. The motorist insured without regard to fault would recover under his or her personal protection policy, but the traditional insured who was not at fault in causing the accident could not recover unless he or she was permitted to sue the other motorist based on fault.

But requiring the other motorist insured without regard to fault to insure based on fault for a claim by a fault insured while surrendering his or her own

4. O'Connell & Joost, *supra* note 3, at 63-75.

5. *Id.* at 71-72.

6. The term "personal protection" is used in preference to "no-fault" throughout this bill because the latter term has come to connote, based on statutes passed under that rubric, laws that include both benefits paid without reference to fault and the preservation of full tort rights, at least above a defined threshold. For a discussion of the (sometimes confusing) terminology applicable to various forms of automobile insurance reform whereby benefits are payable without reference to fault, see DOT Report, *supra* note 3, at 15-16, 21; O'Connell & Joost, *supra* note 3, at 63-64.

right to claim based on fault would obviously be unfairly prejudicial — and expensive — for the motorist insured without regard to fault.

The solution adopted under this bill never takes away tort rights from those electing tort liability insurance. In a collision between motorists insured without regard to fault, neither can assert full scale tort rights against the other, but when a motorist insured based on fault collides with a motorist insured without regard to fault, tort liability claims remain for each against the other -- as is the case with two motorists insured based on fault. Although under this system, those who choose insurance without regard to fault must buy tort liability coverage for claims against them by those insured based on fault, because insurance without regard to fault can be expected to cost substantially less than tort liability coverage, exposure to tort liability for motorists insured without regard to fault will not be all that great. (The comparative costs of insurance regarding and regardless of fault are discussed below.)

This approach has the psychological and political advantage that those electing traditional tort coverage never lose their tort rights. The disadvantage of this approach is that insurers cannot be sure in advance of the potential mix between those insured for traditional tort liability and those insured without regard to fault. The result could be that reductions in premiums could conceivably be significantly less than those which would occur under a device under which insurers could confidently know that no motorist insured, regardless of fault, will be exposed to liability in tort to those electing traditional tort liability insurance.

The latter assurance can be gained by another device which has been suggested for a regime allowing choice between insurance regarding and regardless of fault. Under a scheme of "inverse liability" (or "connector coverage"), in a collision between a motorist covered by traditional tort liability and another insured regardless of fault, no tort claims between the motorists would be allowed, but the driver with traditional tort liability insurance coverage would be allowed to sue his or her own company for damages as if his or her company covered the driver insured regardless of fault. Such a regime mirrors "uninsured motorist" coverage, extant today, which allows victims to claim damages against their own companies if the motorist with whom they collide is uninsured. Under such a regime the costs of "uninsured motorist" coverage would increase, but that increase would be neatly offset by fewer claims against the traditional insured's tort liability coverage in that all those insured regardless of fault would be precluded from liability claims.⁷

A third method of dealing with the reallocation problem has been employed in New Jersey and entails a "risk exchange" to reallocate the money saved by the motorist insured under traditional tort liability back to the motorist insured regardless of fault. Thus, under a risk exchange, as under "inverse

7. For the terms of a bill incorporating such "inverse liability" see O'Connell, *A Draft Bill to Allow Choice Between No-Fault and Fault-Based Auto Insurance*, 27 HARV. J. ON LEGIS. 143 (1990) [hereinafter O'Connell, *Draft Bill*]. The term "inverse liability" was substituted for the earlier term "connector coverage" used to describe such a variation on uninsured motorist coverage to handle the reallocation problem. O'Connell & Joost, *supra* note 3, at 78. See also *infra* note 21.

liability," those insuring regardless of fault get the benefit of surrendering common law liability against those insured under traditional tort liability. But the ability to administer of such a risk exchange device is subject to dispute among insurers.⁸

8. To enable the person who chooses to surrender tort rights to realize the savings therefrom, the legislation could include a provision like that in the New Jersey statute, which creates and sets forth the powers of an "Automobile Insurance Risk Exchange."

There shall be created . . . the New Jersey Automobile Insurance Risk Exchange . . . Every insurer licensed to transact private-passenger automobile insurance in this State shall be a member of the exchange and shall be bound by the rules of the exchange as a condition of the authority to transact insurance business in this State . . . The exchange shall be empowered to raise sufficient moneys (1) to pay its operating expenses, and (2) to compensate members of the exchange for claims paid for noneconomic loss, and associated claim adjustment expenses, which would not have been incurred had the tort limitation option . . . been elected by the injured party filing the claim for noneconomic loss . . .

N.J. STAT. ANN. §§ 39:6A-21 to -22 (West Supp. 1989).

John Conners, Executive Vice-President of Liberty Mutual, a large Boston-based insurer, has offered some statutory language and a simplified example of how such a risk exchange might work:

The Commissioner shall direct all insurers licensed to issue private passenger automobile policies in this state to establish, maintain, and operate a risk exchange mechanism.

The risk exchange shall be for the purpose of assuring a fair and equitable distribution of the loss reduction benefit resulting from the sale of the . . . alternative policies [payable without reference to fault]. The exchange shall determine the percentage of insureds selecting the Limited Tort option for each individual insurer and for the entire industry. The risk exchange shall issue, on an annual basis, assessments (or refunds) to those companies whose percentage of Limited Tort insureds are under (or over) the industry percentage.

Members of the risk exchange shall prepare a plan of operation. Such plan and all amendments shall be subject to the prior approval of the Commissioner. The Commissioner is hereby authorized to promulgate rules and regulations for purposes of implementing this section.

EXAMPLE OF RISK EXCHANGE
STATE X, POLICY YEAR Y

	<i>Industry</i>	<i>Co. A</i>	<i>Co. B</i>
1) Cars Insured	1,000,000	20,000	20,000
1) # Choosing Limited Tort	800,000	15,000	17,000
3) % Choosing Limited Tort	80 %	75 %	85 %
4) # of Cars under/over Industry Average		-1,000	+1,000
5) Average % Premium Difference between Limited and Full Tort Buyers	30 %		
6) Average Limited Tort Premium	\$200	\$210	\$190
7) Charge (or Return) to Company (4) x 30 % x (6)		\$63,000	(\$57,000)

Material submitted by John Conners to, and on file with, the author, June 6, 1990.

The objections of at least one insurance company actuary to such a risk exchange device can be paraphrased as follows. In practice, a risk exchange formula is complicated by the fact that the selection percent will vary by geographical area within the state, as well as by other demographic characteristics. Collecting all the information needed for a precise reallocation of costs may well be not only impractical but impossible. One is forced to approximate formulas which, while they may work in hypothetical situations, may well not do an effective job in reallocating costs in practice. Indeed, the reallocations they force could make matters worse rather than better. Some would argue that in New Jersey, for example, the insurance department has gerrymandered the formula so as not to reallocate as much cost to the Joint Underwriting Association (JUA, the mechanism for insuring those unable to get insurance in the voluntary market) as would be expected based on the JUA's share of those choosing full tort liability rights as compared with the rest of the insurance industry.

The reallocation device chosen in the draft bill presented here allows tort claims between those who choose insurance based on, or regardless of, fault. In point of fact, any of the three allocation devices discussed here would arguably work much better than a tort liability system not allowing a choice for insurance payable regardless of fault. The worst possible solution to the reallocation problem was adopted recently in Pennsylvania's bastardized choice bill, which simply ignored the need for reallocation.⁹ As a result, the cost savings of surrendering tort rights do not accrue to the motorist surrendering the same. Instead, they accrue to the person who was at fault in injuring him or her. That is, surrender of tort rights simply reduces the chances of recovering in tort against the person at fault, which saves money for the latter's insurer but not for the insurer of the motorist surrendering his or her tort rights.¹⁰

An actuarial study for Arizona indicates that for the required coverage of 15,000 dollars in benefits, those purchasing such benefits without regard to fault and no liability coverage¹¹ will save 57.4 percent compared to those purchasing 15,000 dollars of tort liability limits.¹² If one includes those purchasing higher benefits without regard to fault, plus residual liability coverage based on fault, the total savings in the state will be 26.2 percent.¹³ To summarize, the struggle over whether to enact a law mandating the replacement of liability insurance based on fault with loss insurance payable without regard to fault has gone on too long. In effect, trial lawyers — often pointing critically to no-fault laws the inadequacies of which they themselves have engendered¹⁴—have frightened legislators against forcing such loss insurance onto the electorate. It is one thing to argue that motorists should not be *forced* to buy coverage payable without regard to fault in exchange for surrendering the right to claim based on fault, but quite another to argue that one should not be allowed that exchange even if one wants it. The trial bar must assume the latter burden if they oppose the bill I hereby propose.

9. Act of Feb. 7, 1990, § 8 (adding 75 PA. CONS. STAT. § 1705(a)(1) and amending § 1791.1(b)).

10. The Pennsylvania law is fraught with other difficulties too numerous to catalogue here. In brief summary, the Pennsylvania law gives all motorists, effective July 1, 1990, a choice between a limited tort option and a full tort option. A limited tort insured injured in an accident is limited to seeking "recovery for all medical and other out-of-pocket expenses, but not for pain and suffering . . . unless the injuries suffered fall within the definition of 'serious injury' [or another defined exception]" Act of Feb. 7, 1990, § 8 (adding 75 PA. CONS. STAT. § 1705(a)(1) and amending § 1791.1(b)). A motorist surrendering his tort rights has his premiums reduced 22% and one does not surrender his tort rights has his premiums reduced 10%. These cuts are often actuarially too big or too small, depending on one's coverage. The benefits payable regardless of fault under the bill are also woefully inadequate, being limited to \$5,000 for medical expenses for each accident victim. *Id.* (amending 75 PA. CONS. STAT. § 1711(a)).

11. For the actuarial provision in the attached bill, *see infra* note 30 and section 30 of Model Bill. The actuarial study referred to in the text accompanying this note was conducted by Tillinghast Consulting Actuaries for Project New Start, an organization formed for auto insurance reform and including members from insurance companies, consumer groups and government. For an excerpt from the actuarial study, *see* Appendix.

12. *See* the table in the appendix entitled "Estimated Personal Protection Policy Average Loss Cost."

13. *See* the second table in the appendix under the heading "Premium Impact."

14. *See supra* note 2 and accompanying text. *See also* O'Connell, *No-Fault Auto Insurance: Back by Popular (Market) Demand?*, 26 SAN DIEGO L. REV. 993, 995 (1989) [hereinafter O'Connell, *Popular Demand*].

CONSUMER CHOICE IN MOTOR VEHICLE INSURANCE ACT

[Model Bill]

SUMMARY — Legislation for Creation of a Consumer Choice in Motor Vehicle Insurance Act.

AN ACT relating to insurance; creating a system of motor vehicle insurance that offers a choice of methods of protection against losses from personal injury and property damage arising out of the maintenance or use of motor vehicles; abolishing tort liability in certain cases; and providing other matters properly relating thereto:

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THE PEOPLE OF THE STATE OF _____, REPRESENTED
IN THEIR LEGISLATURE, DO ENACT AS FOLLOWS:

SECTION 1. Title.

This Act may be cited as the Consumer Choice in Motor Vehicle Insurance Act.

SECTION 2. Statement of Purpose.¹⁵

15. (The commentary in notes 15-124 has been co-authored by O'Connell and Joost.) Under existing common law, some individuals who are injured in an accident, such as individuals injured in an accident involving only one car, receive no compensation from automobile liability insurance. Other victims may receive compensation, but recovery depends on the conduct of the driver of the other car, as well as one's own conduct, and the amount of the recovery depends upon the amount of the other driver's insurance and other financial resources. If the other driver (or his employer) has substantial resources and the victim proves only the other driver was at fault, the victim will recover damages for pain and suffering as well as for economic loss (i.e., the victim will get full recovery). However, if the other driver is an uninsured motorist without resources or a hit-and-run driver, the victim will recover nothing.

People who like the common law system may continue to use it under the proposed law. Each motorist who thinks this kind of insurance system is too risky, on the other hand, has the right to choose an alternative to it. Each motorist is free to choose the kind and amount of insurance he or she deems appropriate and affordable to protect himself or herself in case of any kind of traffic accident. The Model Bill calls this kind of insurance a "personal protection policy" because it will protect a policyholder from any kind of accident (including a single-car or collision with an uninsured motorist accident) without regard to anyone's fault or lack thereof.

Under the Model Bill, all motorists are allowed to purchase a personal protection policy. A personal protection policy provides substantial benefits to each of the persons covered by it: the owner of an automobile and his or her spouse, children, guests, and injured pedestrians. Each such person is guaranteed minimum basic economic loss benefits up to \$15,000 per victim, after a \$250 deductible. Each personal protection insured in addition, has the right to purchase added insurance for an additional \$85,000 in coverage or a total of up to \$100,000 in economic loss benefits per person.

Under the Model Bill, all motorists are allowed to reject personal protection and thus to retain all rights to sue and be sued that exist under the present liability insurance system. Under current law, if a motorist must have liability insurance coverage up to \$15,000 for any one victim and up to \$30,000 for all the victims injured by the insured motorist in one accident, the Model Bill merely allows motorists alternative ways of meeting the \$15,000 of insurance requirement. Under the Model Bill, a motorist must have either liability insurance or a personal protection policy that would pay \$15,000 to each victim entitled to receive benefits under the policy (in case of liability insurance the total payable to all injured parties is limited to \$30,000).

Section 1 summarizes what happens when the same or different kinds of insureds get into an accident with each other or with an uninsured motorist.

If a motorist who has chosen personal protection gets into an accident with a person who has chosen liability insurance, the personal protection insured victim will be promptly compensated by his or her own personal protection insurer regardless of fault and, in addition, can claim against and sue the other driver (the liability insured) on the ground that he or she was at fault. The reverse is also true, as to liability suits. The liability-insured victim can claim against and sue the personal protection insured driver on the ground that he or she was at fault in causing the accident.

If a motorist who has chosen personal protection gets into an accident with another person who has chosen personal protection, both are promptly compensated under their own policies for their own losses regardless of fault. In this case, the two personal protection insureds do not have the right to claim and sue for full damages (i.e., compensation including economic loss and pain and suffering damages). If either suffers an economic loss in excess of the limits of his or her insurance policy, that person has the right to claim and sue the other for uncompensated economic loss on the ground that the other was at fault.

If a person who has chosen liability insurance gets into an accident with an uninsured motorist, the policyholder will be compensated for losses under the uninsured motorist provisions of his or her own liability policy, which is based on fault, and in addition, has the right to claim and sue the uninsured motorist for full damages.

If a person who has chosen personal protection insurance gets into an accident with an uninsured motorist, the policyholder will be promptly compensated for losses under his personal protection policy regardless of fault, and in addition, has the right to claim and sue the uninsured motorist for full damages.

If an uninsured motorist (the term means the owner of a motor vehicle that is uninsured; a passenger or relative of an uninsured owner is not an uninsured motorist) gets into an accident with a personal protection insured, he or she has no right to claim for property damage against the personal protection insured up to \$10,000. An owner of a motor vehicle that is uninsured will also have no right to claim damages for pain-and-suffering loss

(a) Under existing law, the ability of a person to recover losses incurred as a result of a motor vehicle accident is limited by factors over which the accident victim has no control. The recovery is dependent on the conduct of the other driver, the amount of liability insurance carried by the other driver, and the financial resources of the other driver. Two individuals who have received identical injuries may recover markedly different amounts. Under existing law, many individuals receive little or no compensation for their losses.

(b) This Act gives motorists the right to choose the kinds of personal protection available in case of an automobile accident, and the amount of financial protection they deem appropriate and affordable. Instead of being forced to buy traditional fault liability insurance to protect strangers, motorists will have the opportunity to buy a new personal protection policy to protect themselves and their family members regardless of fault in the event of a motor vehicle accident. Motorists will also have the right to reject the provisions of this Act, and thus retain all rights to sue and be sued for both economic and noneconomic loss based on fault, under the existing fault liability insurance system.¹⁶

(c) The interaction between traditional fault liability insurance and the personal protection policy is as follows:

(1) Motorists who choose the traditional fault liability insurance and who are involved in an accident with any other motorist essentially will retain the system existing now where they have the opportunity to claim and sue based on fault for both economic and noneconomic damages.¹⁷ They will also remain subject to being sued for such liability to others based on fault.¹⁸

(2) Motorists who choose the new personal protection policy system established by this Act and who are involved in an accident with a motorist who has chosen traditional fault liability insurance will be promptly compensated for their own economic losses regardless of fault¹⁹ and can also claim against and sue the other motorist for both economic and noneconomic damages based on fault.²⁰ They

against the motorist who chose personal protection insurance, except where the motorist who chose personal protection was driving under the influence of alcohol or illegal drugs or had committed intentional misconduct.

The Model Bill requires a reduction in premiums for motorists who choose personal protection insurance. The Model Bill requires that the statewide average premium to be charged by each insurer for the personal protection policy and the property damage liability policy required by the Model Bill be at least 20% lower during the first year than the insurer's average statewide premium in effect on July 1, prior to the Act's effective date for the insurance required by the enacting state's financial responsibility laws, including UM (uninsured motorist) coverage.

16. See *infra* section 4 of Model Bill.

17. See *infra* section 12(a) of Model Bill.

18. The right of tort liability insureds to sue each other in tort as well as personal protection insureds arises by negative inference from provisions limiting tort exemptions to other situations. See *infra* section 11 of Model Bill; see also *infra* section 12(a) of Model Bill.

19. See *infra* section 7 of Model Bill.

20. The right of personal protection insureds to sue and be sued in tort by tort liability insureds arises by negative inference from provisions limiting tort exemptions to other situations. See *infra* section 11 of Model Bill.

will also remain in this circumstance subject to being sued for such liability to others based on fault.²¹

(3) Two motorists who each choose the personal protection policy and who are involved in an accident with each other will be promptly compensated under their own policies for their own economic losses regardless of fault.²² In this situation, the two motorists who have chosen the personal protection policy do not have the right to claim and sue for full damages based on fault,²³ but if either suffers a loss in excess of his or her policy's benefit levels, that person retains the right to claim and sue for uncompensated economic loss based on fault.²⁴

(4) If a motorist who has chosen fault liability insurance is involved in an accident with an uninsured motorist, the policyholder can be compensated for losses under the uninsured motorist provisions of his or her own policy based on fault and has the right to claim against and sue the uninsured motorist for full damages based on fault.²⁵ The uninsured motorist forfeits any right to claim for

21. *Id.* This system of allowing motorists' choice as between traditional liability based on fault and payment regardless of fault is different from the "choice" system making use of connector coverage or inverse liability described in O'Connell & Joost, *supra* note 3 and O'Connell, *Draft Bill*, *supra* note 7. Under connector coverage or inverse liability, in an accident between an insured under traditional tort liability and a personal protection insured, neither could sue the other; rather the insured covered by fault liability would claim in tort against his own insurer based on the common law tort liability of the motorist insured without reference to fault much as an insured under the fault system could claim under his uninsured motorist coverage if the other driver is uninsured. The bill being presented here follows the mode of the Kentucky law where in an accident between a motorist insured under fault liability and one insured without reference to fault each can claim in tort against the other. KY. REV. STAT. ANN. §§ 304.39-010 to 304.39-340 (Baldwin 1989); O'Connell, *Popular Demand*, *supra* note 14, at 1006-07. See also *supra* notes 17-20 and *infra* notes 22-24.

22. See *infra* section 7 of Model Bill.

23. See *infra* section 11(a) of Model Bill.

24. See *infra* section 11(c) of Model Bill. Note that motorists electing personal protection insurance are not required to carry tort liability insurance for personal injury. Thus a poorer person with no or few assets to protect can buy only personal protection insurance protecting himself and his family for their medical bills and wage loss. This does not overly disadvantage those injured by the poor since the poor are so likely to be either un- or underinsured anyway.

Note also that because personal protection insureds remain liable for uncompensated economic losses in excess of personal protection insurance or other coverages applicable to injury, poor persons buying only the minimum amounts of personal protection insurance (\$15,000) will more often be able to claim against personal protection insureds buying higher amounts of coverage than vice versa. This can arguably be justified by considerations of income redistribution. Cf. O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333, 356-58 (1981); See also *infra* note 31 and accompanying text. But even without reference to the bill being discussed here, under liability insurance, the poor—carrying either no or low liability insurance—can similarly draw more from the pool of liability insurance than they pay into it. (Though in fact, they may not do so. The poor are often reluctant to invoke the tort process; in addition the poor suffer no or less wage loss and lower medical bills than the affluent. O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 518 (1976).) Granted the proposed plan preserves at least this theoretical advantage of the poor. But it also advantages the more affluent by: (1) guaranteeing that those who buy personal protection insurance will be covered up to whatever high limits they buy irrespective of fault, and (2) by limiting their tort exposure to other personal protection insureds to uncompensated economic loss payable periodically. This means that the temptation of personal protection insureds claiming against other personal protection insureds to pad claims will not be nearly so great as under tort liability. For discussion of "claims padding," see AIRAC, *supra* note 3, and O'Connell, 1981 U. ILL. L. REV., *supra* this note, at 334-40.

25. These rules, extant without the operation of the proposed law, remain unchanged by it.

property damage up to 10,000 dollars and for noneconomic loss against the motorist who has chosen fault liability insurance except where the motorist choosing fault liability insurance was driving under the influence of alcohol or illegal drugs or committed intentional misconduct.²⁶

(5) If a motorist who has chosen the personal protection policy is involved in an accident with an uninsured motorist, the policyholder will be promptly compensated for economic losses under his or her personal protection policy regardless of fault²⁷ and has the right to claim against and sue the uninsured motorist for full damages based on fault.²⁸ The uninsured motorist forfeits any right to claim for the first 10,000 dollars of property damage and for noneconomic loss against the motorist who has chosen the personal protection policy, except where such motorist was driving under the influence of alcohol or illegal drugs or committed intentional misconduct.²⁹

(d) The statewide average premium to be charged by each insurer for the basic personal protection policy and the property damage liability coverage required by this Act in such policy will be at least twenty percent lower during the first year of this Act than the insurer's average statewide premium in effect on the July 1 prior to the January 1 effective date for the insurance required by the financial responsibility laws of this state, including uninsured motorist coverage.³⁰ The trade-off for the partial shield against liability is the waiver of the right to claim for noneconomic loss against other persons who are covered by a personal protection policy. In addition, persons covered by the personal protection policy are guaranteed minimum basic economic loss benefits up to 15,000 dollars, after a 250 dollar deductible, and have the right to purchase additional benefits. Persons who choose the personal protection policy are not required to purchase fault liability coverage for bodily injury.³¹

26. See *infra* section 12(c) of Model Bill. These provisions punishing the uninsured motorist by making him ineligible to claim in tort for property damage under \$10,000 or for noneconomic losses, reflect society's concern at the large number of uninsured motorists in our country and the apparent inability of quasi-criminal sanctions (such as loss of driving privileges) to inhibit being uninsured. Although states require only low limits of tort liability for personal injury—\$15,000 or \$20,000—around 20% of motorists in California either will not or cannot pay the premium, and thereby remain uninsured. The percentage of uninsured motorists can vastly exceed 50% in the inner cities of many major metropolitan areas. Karshner, *Some See No End to the Battle Over No-Fault*, San Francisco Chron., Oct. 4, 1989, at A9, col. 3; Reich, *Auto Insurance: Lobbyists Thwarting Bids at Reform*, L.A. Times, Nov. 23, 1986, at 1, col. 2. See also O'Connell, *Popular Demand*, *supra* note 14, at 1000, 1005-06.

27. See *infra* section 7 of Model Bill.

28. This right to claim against the uninsured motorist, extant at common law, is unchanged by the bill. Such a right is very often only a theoretical one, given the lack of assets held by most uninsured motorists.

29. See *infra* section 11(g) of Model Bill.

30. See *infra* section 30 of Model Bill. This cut in premium stems from eliminating both litigation costs and payment for pain and suffering (as well as subrogation claims for property damage; see *infra* note 32 and accompanying text) stemming in turn from the personal protection system paying without reference to fault only for economic loss.

31. See *supra* note 24.

(e) A motorist who purchases the personal protection policy will have 10,000 dollars of property damage liability insurance as part of his or her mandatory coverage. In order to keep the cost of property damage liability insurance as low as possible, collision insurers of persons who have chosen personal protection policies are prohibited from asserting subrogation claims against other personal protection insureds.³²

(f) To the extent the terms of section 2 may differ from the terms of section 3, the terms of section 3 govern.³³

SECTION 3. Definitions.³⁴

In this Article, unless the context otherwise requires:

(a) "Accidental bodily injury" means bodily injury, sickness or disease, or death resulting therefrom, arising out of the ownership, operation or use of a motor vehicle, or while occupying such vehicle, which is accidental as to the person insured.³⁵

32. See *infra* section 11(g) of Model Bill. For a definition of collision insurance, see *infra* note 60. This provision also (along with those described in *supra* note 24 and accompanying text) enables special cost savings for the poor — a group especially hard hit by the high costs of compulsory auto insurance. See *supra* note 26. Because the poor ordinarily drive older cars uncovered by collision insurance (many motorists are probably well advised not to insure a car for collision coverage if it is more than 3 or 4 years old), poorer motorists buying personal protection insurance will save substantially on property damage liability costs by virtue of their exemption from property damage claims to the extent other personal protection insureds with whom they collide carry collision insurance. Such a provision can also be justified in that once loss is covered by efficient first party insurance payable without reference to fault—such as collision insurance—it no longer makes much economic sense to redistribute the loss under a second insurance scheme, especially a cumbersome one necessitating establishing fault with all its transaction costs. Fleming, *The Collateral Source Rule and Loss Allocation and Tort Law*, 54 CALIF. L. REV. 1478, 1536-37 (1966). See also James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537 (1952).

33. The narrative terms of the summary of the Act's provisions might conceivably be interpreted as in conflict with the subsequent technical provisions implementing the Act, in which case the latter is to control.

34. This section defines the technical terms that are used throughout the Act.

The term "economic loss" (definition i) means pecuniary loss and monetary expenses incurred by or on behalf of an injured person. The categories of economic loss are medical expenses (definition n), medical rehabilitation (definition o), replacement services loss (definition y), and loss of income from work (definition m). The term "noneconomic loss" (definition q) means any loss other than economic loss. It included pain, suffering, inconvenience, and other noneconomic loss listed in the definition. An accident victim who is a liability insured is entitled to recover noneconomic loss from any other driver if he or she can show that the other driver was at fault. An accident victim who is a personal protection insured is normally not entitled to recover noneconomic loss from another personal protection driver. For the exception, see Section 11 of Model Bill. He can recover noneconomic loss damages from his own insurer if he buys a policy rider that contains such coverage.

The term "motor vehicle" (definition p) is defined as a vehicle that must be registered under state law "other than a vehicle with three or fewer load bearing wheels." This definition means that the initiative does not apply to a motorcycle or a moped. The term "operation or use" (definition s) specifically excludes from auto insurance coverage conduct within the course of a business of manufacturing, repairing, servicing, loading, or unloading a motor vehicle, nor such conduct not within such a business, unless such conduct occurs while occupying a motor vehicle.

The term "personal protection insured" (definition w) describes the people who are "insureds" under a personal protection policy, which means they are entitled to benefits payable without regard to fault in case of a motor vehicle accident. The term means a person identified by name as an insured in a personal protection policy and his or her spouse who lives in the same household. The term also includes any other relative and minor in the custody of a named insured who usually lives in the same household. The term personal protection insured also includes any person who sustains accidental bodily injury (definition a) while occupying a vehicle insured for personal protection or who is struck by such a vehicle (unless he or she had rejected personal protection).

35. This last phrase incorporates a common concept in insurance such that a victim of an intentional act (which is not accidental as to the intentional actor) is nonetheless accidental as to the victim of the actor's intentional act.

(b) "Added personal protection" means an optional policy, plan or coverage for personal protection which each insurer issuing motor vehicle liability insurance in this state shall make available. The added personal protection coverage shall include a schedule of benefits with an aggregate limit of 100,000 dollars per person, which includes medical expenses, up to 1,000 dollars per week for loss of income from work, replacement services loss for up to 300 dollars per week, and death benefits of 25,000 dollars if the death occurs within one year after the date of a motor vehicle accident and was a direct result of the accident. Collateral sources shall be subtracted in calculating added personal protection benefits, but an insurer may write added personal protection as primary to collateral sources or as coinsurance with collateral sources.³⁶ Added personal protection may include, at the insured's option, a scheduled pain and suffering coverage with an aggregate limit of 50,000 dollars payable if the injured person sustains an accidental bodily injury which is subject to the limitations on tort liability under section 11 and is a serious injury. Nothing contained in this section prevents a personal protection insurer from also making available optional additional compensation benefits in amounts other than those prescribed in this section. No applicant or insured may be required to purchase a lesser amount than those prescribed by this subsection.

(c) "Basic personal protection" means a policy, plan, or coverage for personal protection which provides benefits for loss resulting from accidental bodily injury resulting from a motor vehicle accident. Basic personal protection benefits consist of the following with an aggregate limit of 15,000 dollars per person.

(1) Medical expenses.

(2) Loss of income from work, up to 200 dollars per week.

(3) Replacement services loss, up to 100 dollars per week.

(4) Death benefits of 5,000 dollars if the death of the injured person occurs within one year after the date of a motor vehicle accident and was a direct result of the accident.

(d) "Cause of action for injury" means a claim for accidental bodily injury for economic or noneconomic loss or both, caused by the negligent conduct or intentional misconduct of another person, and includes a claim by any person other than a person suffering accidental bodily injury based on such injury, including but not limited to, loss of consortium, companionship or any derivative claim.

(e) "Collateral sources" means any benefit a person receives or is entitled to receive from any source, other than added personal protection benefits, as reimbursement for loss resulting from an accidental bodily injury. Such benefits shall be subtracted from loss in calculating the added

36. Although basic personal protection is "primary," added personal protection can be written as "excess" or "co-insurance." To define these terms, primary insurance covers from the first dollar (often after a deductible) as distinguished from excess coverage which pays only after primary coverage has been exhausted. Co-insurance connotes coverage whereby an insured and the insurer share all losses covered by the policy in a proportion stated in the policy. For example, 80-20 would mean that the insurer would cover 80% and the insured 20% of loss.

personal protection benefits and damages payable to a personal protection insured for uncompensated economic loss.³⁷ In calculating the benefits payable to a personal protection insured, no subtraction may be made for the amounts the personal protection insured receives or is entitled to receive:

- (1) in discharge of familial obligations or support;
- (2) by reason of another person's death, except that amounts so received from social security or workers' compensation shall be subtracted; or

(3) as gratuities. Any amount paid by an employer to an employee or the survivors of the employee is not a gratuity.³⁸

(f) "Commissioner" means Commissioner of Insurance.³⁹

(g) "Dependent" means all persons related to another person by blood, marriage, adoption, or otherwise who reside in the same household at the time of the accidental bodily injury, and receive financial services or support from him or her.

(h) "Driving under the influence of alcohol or illegal drugs" means conduct which causes or contributes to the harm claimed (i) if a blood, breath or urine test shows a blood or breath alcohol concentration of 0.10 or more,⁴⁰ (ii) if the driver refuses to submit to a blood, breath or urine test in violation of section _____⁴¹ or (iii) if the driver is convicted of violating section _____ of the motor vehicle code of this state concerning driving impaired by alcohol or drugs.⁴²

(i) "Economic loss" means pecuniary loss and monetary expenses incurred by or on behalf of an injured person as the result of an accidental bodily injury.⁴³

(j) "Governmental Unit" means the United States government, the government of the State of _____, and any agency, authority, board, department, division, commission, institution, bureau or like governmental

37. As to payment of both added personal protection benefits and uncompensated economic loss, they are payable as excess to other coverages such as the victim's own health and disability insurance. As to payment of basic personal protection, such payment, as we have seen, is primary. See *supra* note 36 and accompanying text.

38. This provision is adapted from R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM, § 1.10, at 306 (1965).

39. States variously refer to the pertinent official as "Commissioner," or "Superintendent" or "Director" of insurance.

40. Simply providing for drunk driving, without defining it, raises genuine uncertainties of determining just what constitutes driving under the influence of alcohol. Providing that the term attaches only to conduct for which a conviction of drunken driving is obtained raises real problems of delay while the criminal process winds its often dilatory way to conclusion. In addition, what should be done about probationary programs whereby a conviction is stayed pending remedial treatment in a clinic, etc.? Note that no such clear cut definition of driving under the influence of illegal drugs comparable to blood, breath or urine tests for alcohol is available. As a result, no clear alternative seems available to litigating such conditions on a cumbersome, fact-oriented case-by-case basis.

41. Such conduct—which can also result in disciplinary action including loss of a driver's license—is similarly equated with drunken driving in this provision.

42. The inclusion of this provision would cover the unlikely situation where a person is convicted for driving under the influence without evidence of the blood-alcohol level or a refusal to submit to a blood-alcohol test.

43. This term is used in counter-distinction to noneconomic loss (such as pain and suffering) defined in *infra* section 3(q) of the Model Bill. As section 2 makes clear, personal protection is payable only for economic—not noneconomic—loss.

entity of either such government, or any local government in this state, and such units thereof, including, but not limited to, counties, cities, towns, and other regional governments.⁴⁴

(k) "Injured person" means a person who sustains accidental bodily injury when eligible for benefits under a policy providing personal protection or under the assigned claims plan⁴⁵ under section 20. The term also includes where appropriate the personal representative of an estate.

(l) "Intentional misconduct" means conduct whereby harm is intentionally caused or attempted to be caused by one who acts or fails to act for the purpose of causing harm or with knowledge that harm is substantially certain to follow when such conduct caused or substantially contributed to the harm claimed for. A person does not intentionally cause or attempt to cause harm (i) merely because his or her act or failure to act is intentional or done with the realization that it creates a grave risk of causing harm or (ii) if the act or omission causing bodily harm is for the purpose of averting bodily harm to oneself or another person.⁴⁶

(m) "Loss of income from work" means 80 percent loss of income from the work the injured person would have performed if he or she had not been injured, reduced by any income from substitute work actually performed by him or her or by income he or she would have earned in available appropriate substitute work he or she was capable of performing but unreasonably failed to undertake.⁴⁷ Loss of income from work does not include any loss after the death of the injured person and payment for

44. Special provisions deal with tort claims by those receiving personal protection benefits against a governmental unit. See *infra* section 11(h) of the Model Bill.

45. The assigned claims plan under *infra* section 20 deals with those to whom personal protection benefits are payable but where a personal protection insurer is unidentifiable to make such payments.

46. This provision comes into play: (1) to deny personal protection insureds the right to personal protection benefits under section 6, and (2) to enable personal protection insureds to be sued by other personal protection insureds and uninsured motorists, despite the tort exemption, under sections 11(b) and (g) of the Model Bill, respectively.

In order to be disqualified from receipt of [personal protection] benefits, [and to remain liable in tort], a person must intend [to inflict injury] Thus, one who has merely intended to frighten another is not disqualified from receipt of benefits [nor liable in tort]. Nor . . . [does he fit in those categories] . . . merely because his conduct created great risk of injury, because he knew his acts were negligent or reckless, or because he intended the act which resulted in the injury. The final sentence provides that the disqualification is inapplicable where the claimant acted in self-defense or in defense of a third person. No requirement is imposed by this sentence that the claimant's self-defense or defense of a third person be reasonable. Consistent with the general policy of this Act to pay benefits without reference to fault, it would be inappropriate to deny benefits to those persons who had acted in good faith, although they had acted negligently.

National Conference of Commissioners on Uniform State Laws, Handbook of the National Conference of Commissioners on Uniform State Laws, UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT, § 22, commentary at 306-07 (1972) [hereinafter UMVARA].

47. [T]he definition contains an explicit reference to the doctrine of avoidable consequences—work loss is computed by subtracting not only income from work which the injured person undertook in lieu of that which his injury prevented him from performing but also income which he might have earned in available appropriate substitute work. As under the common law doctrine of avoidable consequences, the issue is whether claimed work loss is justly attributable to the injury. Subtraction of potential income from alternate work which the injured person declines is proper only where, under all the circumstances, the alternate work is "appropriate" and the injured person's refusal to undertake the work is "unreasonable."

Id. at § 1(5)(ii), commentary at 271.

the period of disability shall not exceed two years from the date of the accident.

(n) "Medical expenses" means reasonable amounts incurred by an injured person for necessary medical, surgical, radiological, dental, ambulance, hospital, medical rehabilitation and professional nursing services, eyeglasses, hearing aids, and prosthetic devices. The words "incurred by" include medical expenses incurred on behalf of an injured person by a parent or guardian if the injured person is a minor or incompetent, or by a surviving spouse if the injured person is deceased. Personal protection insurers may review medical expenses to assure that the expenses are reasonable and necessary. Under basic personal protection and added personal protection, medical expenses are promptly payable to the injured person for covered expenses incurred within two years after the date of the accident. "Medical expenses" do not include:

(1) that portion of a charge for a room in a hospital, clinic or convalescent or nursing home, or any other institution engaged in providing nursing care and related services, in excess of a reasonable and customary charge for semi-private accommodations, unless medically required; or

(2) treatments, services, products or procedures that are experimental in nature, or for research, or not primarily designed to serve a medical purpose, or which are not commonly and customarily recognized throughout the medical profession and within the United States as appropriate treatment of the accidental bodily injury.

(o) "Medical rehabilitation" means rehabilitation services which are reasonable and necessary to reduce the disability and restore the pre-accident level of physical functioning of the injured person.

(p) "Motor vehicle" means:

(1) a vehicle of a kind required to be registered under the laws of this state relating to motor vehicles, other than a vehicle with three or fewer load-bearing wheels;⁴⁸ or

(2) a vehicle, including a trailer, designed for operation on a public roadway by other than muscular power, except a vehicle used exclusively on stationary rails or tracks. For the purposes of this section "public roadway" means a way open to the use of the public for purposes of automobile travel.⁴⁹

(q) "Noneconomic loss" means any loss other than economic loss and includes, but is not necessarily limited to, pain, suffering, inconvenience, physical impairment, mental anguish, emotional pain and suffering, he-

48. Thus a motorcycle, and the occupants thereon, are not insured under personal protection. The tremendous exposure of a motorcyclist to personal injury would mean that switching to first-party coverage whereby the motorcyclist insured himself for his injuries, whether based on fault or not, would cause an exponential rise in motorcyclist's personal injury premiums. The solution adopted under this bill is simply to exempt motorcyclists from the choice system, such that motorcyclists can sue and be sued in tort after collision with those insured for personal protection benefits as well as with those insured under fault liability insurance.

49. This definition of a "public roadway" excludes trails open to the public but designed solely for off-road vehicles. UMVARA, *supra* note 46, § 1(7), commentary at 273.

donic damages⁵⁰ and loss of any of the following: earning capacity,⁵¹ consortium, society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance or education, and all other noneconomic damage whether formerly recoverable under the law of this state or not. Noneconomic loss does not include economic loss caused by pain and suffering or by physical impairment.⁵²

(r) "Occupying" means to be in or upon a motor vehicle or engaged in the immediate act of entering into or alighting from the motor vehicle.

(s) "Operation or use" means operation or use of a motor vehicle as a motor vehicle, including, incident to its operation or use as a vehicle,⁵³ occupying it. Operation or use of a motor vehicle does not cover conduct within the course of a business of manufacturing, selling or maintaining a motor vehicle, including repairing, servicing, washing, loading or unloading, nor does it include such conduct not within the course of such a business unless such conduct occurs while occupying a motor vehicle.⁵⁴

50. Hedonic damages are payable for the loss of "the pleasure of living which is destroyed . . ." *Sherrod v. Berry*, 629 F. Supp. 159, 163 (N.D. Ill. 1985), *rev'd on other grounds*, 856 F.2d 802 (1988).

51. Loss of earning capacity is to be distinguished from loss of actually expected earnings. Thus, loss of earning capacity covers the case of an unemployed housewife, not necessarily expecting to be employed, for the loss or lessening of her potential for earning income. Loss of earning capacity is obviously of a pecuniary nature but nonetheless it is usually included under the rubric of general damages (which, generally speaking, cover non-pecuniary loss such as pain and suffering) as opposed to special damages (which, generally speaking, cover pecuniary losses). *See, e.g., Capriotti v. Beck*, 264 Minn. 39, 117 N.W.2d 563 (1962). *Contra e.g., Shebester, Inc. v. Ford*, 361 P.2d 200 (Okla. 1961).

52. Under this provision, if psychic loss leads to pecuniary loss—such as the need for psychiatric services or inability to work because of sheer pain—such loss would be payable under the above provision under pecuniary loss. It should also be noted that in paying for medical treatment to relieve pain, the proposed bill by no means ignores pain. Recent years, especially since World War II, have seen dramatic innovations in treatment for the relief of pain, not only through analgesics, but through many more novel psychiatric and other devices in pain clinics and otherwise. *See, e.g., Rosenthal, Powerful New Weapons Change Treatment of Pain*, N.Y. Times, Feb. 13, 1990, at C1, col. 2.

53. While "use" has a broader meaning than operating or driving a vehicle, the requirement that use of the motor vehicle be "as a motor vehicle" qualifies the term so that both the tort exemption and the availability of . . . benefits [without reference to fault] are more nearly limited to activities whose costs should be allocated to motoring as part of an automobile insurance package. For example, it has no application to an injury which occurs when a person slips and falls inside a travel trailer which has been parked at a camp site.

UMVARA, *supra* note 46, § 1 (6), commentary at 272. *See also infra* note 54.

54. The indefiniteness of the defined term ["as a vehicle"] has produced litigation in cases arising under automobile liability policies. In some cases, in part because of a tendency to construe an ambiguous term against the interests of the companies drafting the policy, and, in part to assure a solvent source of payment to a person injured by an admitted wrongdoer, it is arguable that courts have included accidents too far removed from the general activity of motoring and that a narrower construction of the term would be more consistent with the policy of this Act. Other than specifying that injury arise out of maintenance or use "as a vehicle," it has not been possible to define the general concept more specifically, so borderline cases are left to the courts, as they have been under current automobile insurance policies. However, in the case of "loading and unloading" the vehicle, the term which has produced some of the most extreme interpretations in litigation over policy forms, . . . [Personal protection] benefits are not available unless the conduct in loading or unloading took place while the injured person was occupying, entering into, or alighting from the vehicle. This limitation . . . is consistent with the philosophy of this Act, to compensate losses resulting directly from motoring accidents and to leave to other forms of insurance and compensation systems those losses which are tangential to motoring. Existing tort liability is not altered for accidents arising from loading and unloading which are outside of this definition . . . [see section 11(a)] . . .

Id., § 1(6), commentary at 272-73.

(t) "Owner" means the person or persons, other than a lien holder or secured party, who owns or has title to a motor vehicle or is entitled to the use and possession of a motor vehicle subject to a security interest held by another person. Owner does not include (i) a lessee under a lease not intended as security, or (ii) the United States of America or any agency thereof except with respect to motor vehicles for which it has elected to provide insurance.

(u) "Person" includes an organization, public or private.

(v) "Personal protection" means a policy, plan or coverage which provides basic or added personal protection benefits for loss resulting from accidental bodily injury, regardless of fault.

(w) "Personal protection insured" means:

(1) a person identified by name as an insured in a contract providing personal protection benefits;

(2) while residing in the same household with a named insured, the following persons:

(A) a spouse or other relative of a named insured; or

(B) a minor in the custody of a named insured. A person resides in the same household if he or she usually makes his or her home in the same family unit, even though he or she temporarily lives elsewhere.

(3) a person with respect to accidents within this state who sustains accidental bodily injury while occupying or when struck by a motor vehicle insured for personal protection, unless the person has rejected the coverage under section 12.

(x) "Personal protection insurer" means an insurer or qualified self-insurer⁵⁵ providing personal protection benefits.

(y) "Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services from others, not members of the injured person's household, in lieu of those the injured person would have performed for the benefit of the household. Replacement services losses are not due if the injured person is entitled to receive personal protection benefits for loss of income from work for the same period. Replacement services loss does not include any loss incurred after the death of an injured person, and the disability period shall not exceed two years from the date of the accident.

(z) "Resident relative" means a person related to the owner of a motor vehicle by blood, marriage, adoption or otherwise and residing in the same household. A person resides in the same household if he or she usually makes his or her home in the same family unit, even though temporarily living elsewhere.

55. All states allow persons or institutions to insure themselves, rather than paying an insurance premium to a third party, providing that proper security for payment and administration of claims is posted with state authorities.

(aa) "Serious injury" means an accidental bodily injury which results in death, dismemberment, significant and permanent loss of an important bodily function, or significant and permanent scarring or disfigurement.

(bb) "Uncompensated economic loss" means that portion of economic loss arising out of an accidental bodily injury of an injured person which exceeds the benefits provided by a personal protection insurer under a policy providing such benefits (except for loss incurred by a deductible under such a policy) and collateral sources. Such loss is payable under the same terms and limitations as under added personal protection, but shall not be subject to the limit of liability of such coverage.⁵⁶

(cc) "Uninsured motorist" means the owner of a motor vehicle uninsured for either basic personal protection or liability insurance at the limits prescribed by this state's financial responsibility laws.

SECTION 4. Insurance Requirements.⁵⁷

(a) Each motor vehicle required to be registered in this state shall be insured for basic personal protection and for at least the minimum property damage liability limits mandated under this state's financial responsibility laws unless the owner of the motor vehicle exercises his or her right of rejection under section 12. An insurance policy written by a personal protection insurer under this Article to provide basic personal protection is deemed to include all basic personal protection coverage required by this Article. Coverage under basic personal protection meets the requirements of this state's financial responsibility laws.⁵⁸

(b) In addition to added personal protection coverage, a personal protection insurer shall make available additional insurance coverage. The additional coverage shall include bodily injury liability insurance,⁵⁹ collision coverage⁶⁰ and comprehensive physical damage.⁶¹ The exercise of the option not to purchase added personal protection by a named insured or an applicant shall be binding on all personal protection insureds covered under the policy. A personal protection insurer shall also make available

56. For the circumstances under which a claim for uncompensated economic loss is recovered, see *supra* text accompanying note 24. Added personal protection can be purchased to provide payment for economic loss in excess of basic personal protection. Basic personal protection limits are designed to equal the amounts required under the enacting state's financial responsibility law for personal injury liability. Generally that is in the range of \$10-20,000. For a listing of each state's financial responsibility requirement, see DOT Report, *supra* note 3 at 23-64. Although compensation for uncompensated economic loss is payable without any limit, as a practical matter rarely will amounts be collectible beyond liability insurance carried by the motorist against whom a claim is made.

57. This section, which is called "Insurance Requirements," is the core of the initiative bill. The section provides that the purchase of basic personal protection meets the requirements of this state's mandatory motor vehicle insurance law. The section requires each insurance company to make available added personal protection coverage (i.e., coverage up to \$100,000 in economic loss and up to \$50,000 for pain and suffering) and additional coverages if it sells basic personal protection insurance.

58. See *supra* section 2(b) of Model Bill.

59. A personal protection insured is not required to carry liability insurance. See *supra* note 24 and accompanying text.

60. Collision insurance is automobile insurance against loss or damage to the insured's vehicle resulting from collision with another object. Benefits are payable without regard to anyone's fault.

61. Comprehensive physical damage insurance covers any physical loss to an automobile except by collision or upset, payable without regard to anyone's fault. This would include, for example, loss caused by fire, theft, or vandalism.

pain and suffering coverage, under regulations issued under section 25 of this Act, with a limit of 50,000 dollars, payable if the injured person sustains an accidental bodily injury which is subject to the limitations on tort liability under section 11 and is a serious injury. Nothing contained herein shall preclude an insurer from offering higher limits of pain and suffering coverage or providing broader coverage.

(c) A personal protection insurer is authorized to write personal protection insurance without any deductible or subject to reasonable deductibles under regulations issued under section 25.

SECTION 5. Geographic Application of Personal Protection Policies.⁶²

(a) A personal protection insurer shall pay to a personal protection insured benefits for accidental bodily injury sustained within the United States, its territories or possessions, or Canada.

(b) A personal protection policy issued in this state contains coverage such that it satisfies the financial responsibility laws of any other state or Canadian Province in which the insured motor vehicle is operated.⁶³

SECTION 6. Persons Not Entitled to Personal Protection Benefits.⁶⁴

(a) A personal protection insurer has no obligation to provide benefits to or on behalf of an injured person who at the time of the accident:

(1) was involved in a motor vehicle accident while committing a felony or while voluntarily occupying a motor vehicle that he or she knew to be stolen;

(2) was driving under the influence of alcohol⁶⁵ or illegal drugs;⁶⁶

(3) was occupying an uninsured motor vehicle owned by the person;

(4) was guilty of intentional misconduct⁶⁷ (If the person dies as a result of his or her own intentional misconduct, his or her survivors are not entitled to personal protection for loss arising from the decedent's injury or death);

(5) has rejected the limitation on his or her right to sue under section 12;

(6) was an uninsured motorist;

62. This section provides that personal protection benefits shall be paid to a personal protection insured injured anywhere in the United States or Canada. A personal protection policy must contain provisions that satisfy the financial responsibility law of any state or Canadian Province in which the insured motor vehicle is operated.

63. Financial responsibility laws require motorists (or place penalties on them for failing) to carry minimum limits of automobile insurance.

64. This section describes eight categories of people who are not entitled to receive any benefits under a personal protection policy of insurance. This section provides that no benefits will be paid to thousands of individuals who fall into one or more of the following categories: Persons driving under the influence of alcohol or illegal drugs; persons occupying an insured motor vehicle which they themselves own; persons operating or occupying a motorcycle; persons occupying a motor vehicle known to be stolen or used in the course of committing a felony; and persons guilty of intentional misconduct (i.e., a person who intended to commit homicide, assault, or suicide by automobile).

65. See *supra* note 40 and accompanying text.

66. *Id.*

67. See *supra* note 46 and accompanying text.

(7) was operating or occupying a motor vehicle with three or fewer load bearing wheels;⁶⁸ or

(8) was injured while occupying a motor vehicle owned by, or furnished or available for the regular use of, the injured person, or the injured person's resident spouse or relative, if such motor vehicle is not described in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy.

(b) A personal protection insurer may include in personal protection coverage any person under subsection (a) if the insurer states its intent to do so clearly on the policy.

SECTION 7. Payment of Personal Protection Benefits.

At the option of the personal protection insurer, personal protection benefits are payable to any of the following persons:

- (1) The injured person;
 - (2) The parent or guardian of the injured person, if the injured person is a minor or incompetent;
 - (3) A survivor, executor or administrator of the injured person;
- or
- (4) Any other person or organization rendering the services for which payment is due.

SECTION 8. Multiple Coverages.⁶⁹

Regardless of the number of motor vehicles involved, persons covered, claims made, motor vehicles or premiums shown on the policy or premiums paid, the liability limits under a motor vehicle insurance policy for any coverage shall not be combined with or added to any other coverage limit to determine the maximum limit of coverage available to an injured person. Unless the contract clearly provides otherwise, the contract may provide that if two or more policies, plans, or coverages apply equally to the same accident, the highest limit of liability applicable is the maximum amount available to an injured person under any one of the policies. Each policy, plan, or coverage is responsible for its proportionate share of the loss.

SECTION 9. Priority of Benefits.⁷⁰

68. See *supra* note 48 and accompanying text.

69. This section is designed to deal with the phenomenon known in insurance terms as "stacking"—a term that refers to payment for a single loss from multiple insurance coverages. Thus if an insured is allowed to stack coverages, he is allowed to recover a sum up to the stated limit of each policy that provides coverage. So, if he owns three cars, each insured for \$15,000, and suffers \$45,000 in losses in one accident in one of his cars, he would be paid \$45,000. R. JERRY, UNDERSTANDING INSURANCE LAW 678 (1987). The above provision in the bill is designed to prevent stacking. Under it, in the above example only \$15,000 would be paid. Thus, someone who wishes higher coverage should increase the limits under a policy he carries. *Id.* at 679.

70. This section determines which personal protection coverage will provide compensation to a person qualified to receive such benefits. The underlying principle set forth in section 9(a)(1) is that a person suffering loss should make his claim for benefits against the insurer of the car which he was occupying or was struck by. In effect, then, the insurance follows the car, not the driver (and his family). Concerning this distinction, see DOT Report, *supra* note 3, at 137; see also R. KEBTON & J. O'CONNELL, *supra* note 38, at 370-79.

Under subsection (b), if two or more insurers of the same priority level are obligated to pay personal protection benefits, the insurer against whom the claim is first made shall pay and may thereafter recover a pro rata

(a) Subject to section 8, a person who is entitled to receive personal protection benefits may claim the benefits in the following order up to the limits of personal protection in the listed category.

(1) The personal protection covering a motor vehicle involved in the accident, if the person injured was an occupant of or was struck by the motor vehicle.

(2) The personal protection under which the injured person is or was an insured.

(b) If two or more insurers at the same priority level are obligated to pay personal protection benefits, the insurer against whom the claim is first made shall pay the claim and may thereafter recover a pro rata contribution from any other insurer at the same priority level for the costs of the payments and for processing the claim. For the purposes of this section, an unoccupied parked motor vehicle is not a motor vehicle involved in an accident unless parked in such a way as to cause unreasonable risk of injury.

SECTION 10. Other Sources of Indemnity for Basic Personal Protection Benefits.⁷¹

(a) A basic personal protection insurer is primarily obligated to indemnify an injured person, except that benefits payable for the same accidental bodily injury under state mandated disability coverage or workers' compensation or similar occupational compensation act shall be subtracted from the basic personal protection benefits payable to the injured person. Any other benefits payable for accidental bodily injury are secondary to the benefits payable for the basic personal protection.

(b) Basic personal protection is subject to a 250 dollar deductible with respect to a claim by the named insured or a person residing in the same household with the named insured. A basic personal protection insurer may write policies with a deductible that is higher or lower than that prescribed by this subsection under rules adopted by the Commissioner.

(c) Added personal protection is written as excess insurance under section 3(b). A provider of personal protection benefits or other collateral sources shall not recover any amount against the claimant under a claim for added personal protection benefits or for uncompensated loss and shall not be subrogated to any rights the claimant may have.⁷²

(d) Notwithstanding any provision to the contrary, a personal protection insurer is subrogated, to the extent of its obligations, to all of the

contribution from every other insurer at the same priority level. The section also provides that an unoccupied parked motor vehicle is not a motor vehicle involved in an accident, such that it becomes the source of payment, even if it is damaged in the accident, "unless parked in such a way as to cause unreasonable risk of injury."

71. See *supra* notes 36-37. Section 10 of the Model Bill concerns the effect of collateral sources of benefits (such as health and disability coverages) on the right to receive personal protection benefits. In calculating net loss for the purposes of determining personal protection benefits, one must subtract only those benefits or advantages entitled to be received from workers' compensation or other similar state mandated programs. See *UMVARA*, *supra* note 46, § 11(a), commentary at 290.

72. See *supra* note 37. Unlike basic personal protection, added personal protection is excess insurance over all other collectible coverage, with the added personal protection insurer, like the basic personal protection insurer, having no right of subrogation (except as provided in section 10(d) and section 4 of the Model Bill).

rights of its personal protection insured with respect to an accident caused in whole or in part by:

- (1) the negligence of an uninsured motorist;⁷³
- (2) the negligence of the owner or operator of a motor vehicle having a gross weight of 7,000 pounds or more;⁷⁴
- (3) driving under the influence of alcohol or illegal drugs;⁷⁵
- (4) intentional misconduct; or
- (5) any person who has rejected, or is otherwise not affected by, the limitations on tort rights and liabilities.⁷⁶

SECTION 11. Legal Liability; Exemption of Personal Protection Insured.⁷⁷

(a) No person covered by personal protection insurance has a cause of action for injury against any other person covered by personal protec-

73. See *supra* note 28 and accompanying text. Thus to the extent that the personal protection insurer is obligated to pay any personal protection benefits, it has a right to be reimbursed for same against an uninsured motorist.

74. Given their greater weight, in truck-car collisions, large trucks disproportionately effect damage on private passenger vehicles and their occupants rather than vice versa. Lacking the above provision there would be a windfall to owners of such trucks and other large commercial vehicles following truck-car collisions in that the insurer of each vehicle would simply pay the occupants of its own vehicle. Thus as a simple solution to this problem, the bill allows subrogation based on fault by private passenger car personal protection payers against trucks and other vehicles having a weight of 7000 pounds or more.

75. Even a personal protection insured remains liable to another personal protection insured for driving under the influence of alcohol or drugs (as well as for intentional misconduct). See *supra* notes 40-42 and accompanying text.

76. Such persons would include those who rejected personal protection coverage and correspondingly retained their tort rights (*supra* note 16 and accompanying text) and out-of-state motorists present in the enacting state for less than 30 days. See *infra* section 28 of the Model Bill.

77. This section defines the extent to which a personal protection insured who is injured in a motor vehicle accident is prohibited from bringing a lawsuit in tort against any other personal protection insured.

Subsection (a) provides that no personal protection insured shall have a cause of action for injury against any other person covered by personal protection insurance, except as provided in the next four subsections of this section.

Subsection (b) provides that a victim has a cause of action for injury (for both economic and noneconomic loss) against another person covered by a personal protection policy if the other person drove "was under the influence of alcohol or illegal drugs or . . . was guilty of intentional misconduct."

Subsection (c) provides that an accident victim has a cause of action against another person covered by a personal protection policy for uncompensated economic loss.

Subsection (d) provides that an accident victim who does not own a car or belong to a car owning family may, if injured while occupying or through being struck by a motor vehicle insured for personal protection, receive personal protection benefits and may claim uncompensated economic loss against the personal protection insured.

Subsection (e) provides that benefits include reasonable expenses in collecting benefits, including reasonable attorney's fees.

Subsection (f) provides that a personal protection insured has a cause of action against another personal protection insured for property damage only to the extent that the property is not covered by collision insurance.

Subsection (g) deals with the rights and obligations of owners of uninsured motor vehicles and persons who drive under the influence of alcohol or illegal drugs. An uninsured motorist may not bring a cause of action against a personal protection insured for property damage, unless such damage exceeds \$10,000, or for noneconomic damages, unless the personal protection insured was driving under the influence of alcohol or illegal drugs or was guilty of intentional misconduct. An uninsured motorist, on the other hand, remains liable in tort to any injured person for both personal injury and property damage.

Subsection (h) provides that a victim who is a personal protection insured normally has no cause of action against a governmental unit if the cause of action is based on something other than the operation or use of a motor vehicle (i.e., negligent design or maintenance of a highway) if the government unit agrees in writing to pay the victim all of his or her economic losses in excess of that paid the victim by the personal protection insurer.

tion insurance, including any other person for whom a personal protection insured is vicariously liable,⁷⁸ except as provided in subsections (b), (c), (d) and (e) of this section, and except for accidental bodily injury caused by other than the operation, or use of a motor vehicle by such other person.⁷⁹

(b) A personal protection insured has a cause of action for injury not limited to economic loss against another person covered by personal protection who was driving under the influence of alcohol or illegal drugs or was guilty of intentional misconduct.⁸⁰ The injured person may, as an alternative, claim personal protection benefits up to the amount specified in such other driver's policy, plus reasonable attorney fees under subsection (e).⁸¹ Any party who provides personal protection benefits or collateral sources to the injured person has a right of subrogation.⁸²

(c) A personal protection insured may bring a cause of action for injury against another personal protection insured, for uncompensated economic loss.⁸³

(d) A person suffering accidental bodily injury while occupying or when struck by a motor vehicle which is insured for personal protection and who is not at the time of the accident covered by a rejection of limitations on tort rights and liabilities under section 12 and is not an uninsured motorist may receive personal protection benefits applicable to the motor vehicle and has a right to claim uncompensated economic loss against the personal protection insured.⁸⁴ A person who files a claim under this subsection has the same rights and duties as a personal protection insured with respect to a claim by that insured.⁸⁵

(e) Benefits received under this section shall include reasonable expenses incurred by the person in collecting the benefits and shall include reasonable attorney fees. No part of the attorney fees may be charged against benefits otherwise due the claimant, and an attorney may not charge an additional fee to collect the benefits.⁸⁶ Part or all of the attorney fees may be deducted from the benefits otherwise owing if a significant part of the claim was fraudulent. In an action brought by a personal pro-

78. See *supra* section 2(c)(3) of Model Bill.

79. Thus, a railroad covering the motor vehicles it owns under personal protection remains liable for an accident in which its train negligently collides with a motor vehicle. See *supra* note 53 and accompanying text.

80. See *supra* note 75 and accompanying text.

81. Thus, a victim eligible to claim in tort for full common law damages, but not wanting to undergo the prolonged delays of tort litigation, can claim for more prompt but lesser personal protection benefits.

82. Thus, a health insurer, for example, paying benefits to the victim of a personal protection insured guilty of drunken driving has a right to be reimbursed from such driver.

83. Even a personal protection insured injured by a driver guilty of conduct defined in subsection (b) can always, in the alternative to suing under subsection (b), claim for uncompensated economic loss above his own personal protection coverage.

84. This is a catch-all provision providing for those who, for example, are not members of a car owning family.

85. Thus, payment under this provision is made subject to all the terms applicable to a claim made by a personal protection insured. For example, payment would be made periodically under section 14 of the Model Bill.

86. Because payment is made only for a claimant's economic losses, unless a claimant's attorney's fee were paid in addition to his damages, he would be forced to pay his lawyer out of his own pocket.

tection insurer, attorney fees shall be awarded to the injured person only if the injured person is the prevailing party.⁸⁷

(f) A personal protection insured has a cause of action against another personal protection insured for property damage only to the extent that the property is not covered by collision insurance.⁸⁸

(g) An uninsured motorist may not bring a cause of action for property damage, except for such damage that exceeds 10,000 dollars, or for noneconomic damages against a personal protection insured unless the personal protection insured was driving under the influence of alcohol or illegal drugs or was guilty of intentional misconduct. An uninsured motorist remains liable in tort to an injured person for personal injury and property damage.⁸⁹

(h) A personal protection insured suffering accidental bodily injury has no cause of action for injury against a governmental unit or any individual for whom a governmental unit is vicariously liable if:

(1) the cause of action is based on something other than the operation or use of the motor vehicle, and

(2) within 180 days after the accident or after the filing of the cause of action, the governmental unit agrees in writing to pay the personal protection insured added protection benefits to cover any economic loss in excess of any benefits paid by a personal protection insurer, including attorney fees.⁹⁰ A personal protection insured may, however, reject such offer to be paid added protection benefits and pursue a cause of action for injury against any such individual, but only if it can be proven beyond a reasonable doubt that such individual was guilty of wanton or intentional misconduct.

SECTION 12. Right to Choose to Remain in Tort System.⁹¹

87. Thus, if an insurer brought an action against a claimant for failing to undertake reasonable employment which was appropriate for the claimant, the claimant would be awarded attorney's fees only if he prevailed in the litigation.

88. See *supra* note 32 and accompanying text.

89. See *supra* section 2(c)(5) of Model Bill.

90. This provision grows out of a recognition of the phenomenon that benefits paid regardless of fault can be expected to excite more aggressive tort claims against third parties, including the government which builds and maintains roads. Arguably it is not a good idea to close off wasteful, inefficient tort litigation in one area (against motorists) in order to expand litigation in an allied area (against the government). The above provision arguably avoids that result, and at the same time encourages prompt, periodic payment of actual losses above the amount of personal protection benefits. Thus, when a motorist eligible for personal protection benefits makes a third-party claim against the government based, for example, on defective maintenance of the road, the government will have the right to make such "an early offer." For the origin of the "early offers" idea, see O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims By Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 Nw. U. L. REV. 589 (1982). Thus, governmental units are provided incentives to offer, within 180 days, to pay periodically the victim's medical expenses, wage loss, and other monetary losses not covered by personal protection insurance, or other loss insurance applicable to the victim, plus an hourly fee for the victim's lawyer.

91. This section authorizes motorists to reject the personal protection system and choose to remain within the tort system. Subsection (a) directs the Commissioner of Insurance to establish procedures for rejecting limitations on tort, and for establishing the effective date of such a rejection.

Subsection (b) provides that these rules shall state that such a rejection shall not be valid with respect to a person who is an uninsured motorist at the time that he or she was injured in a motor vehicle accident.

Subsection (c) provides that a rejection of tort limitations results in the full retention of all tort rights and liabilities, except that there are limits on the right of an uninsured motorist to recover damages in tort. An

(a) To ensure preservation of the right to choose to reject any limitations on tort rights and liability contained in this Article, the Commissioner shall establish by rules and procedures whereby any person may execute a form approved by the Commissioner for rejecting such limitations.⁹² The rules shall establish the effective date of such a rejection. Any rejection by a person who is under a legal disability shall be made on behalf of such person by a parent, legal guardian or conservator and shall remain in effect until revoked or until the person is no longer under legal disability, whichever is sooner.

(b) The rules shall provide for the validity of such rejections except with respect to an injured person who is an uninsured motorist at the time of the accident.⁹³ A motor vehicle liability insurance policy issued to satisfy the financial responsibility laws of this state may include basic personal protection benefits to cover those persons who have not rejected tort limitations.⁹⁴

(c) A rejection results in the full retention of all tort rights and tort liabilities, except that an uninsured motorist may not claim in tort for property damage except for such damage that exceeds 10,000 dollars or for noneconomic damages against a person who has rejected tort limitations, unless the person who has rejected tort limitations is driving under the influence of alcohol or illegal drugs or is guilty of intentional misconduct.⁹⁵ An uninsured motorist retains fault liability with respect to others. A person driving under the influence of alcohol or illegal drugs may not

uninsured motorist does, however, retain full tort liability with respect to others. Subsection (d) provides that the rejection of tort limitations applies to any motor vehicle accident occurring after its effective date. Such a rejection may be revoked at any time, but the revocation must be in writing on a form prescribed by the Commissioner of the Department of Insurance.

The Commissioner of Insurance is required, by subsection (e), to maintain a program to assure that consumers are adequately informed about the comparative costs, benefits, rights, and responsibilities of insureds under the two types of insurance: personal protection insurance and tort liability insurance.

Subsection (f) states that a person is bound by his choice between the two systems and "is precluded from claiming liability of any party based on being inadequately informed as to the coverage or rejection." Putting the two subsections together, insurers, brokers, and agents are immune from claims for inadequately informing insureds as to the available choices, provided they furnished these insureds in advance with the information generated by the program maintained by the Department of Insurance.

Subsection (g) provides that a motor vehicle insurer may insist that all the motor vehicle insurance policies within the same household be of the same type. Without this provision, an insurer might find it administratively burdensome to provide automobile insurance to some families.

Subsection (h) provides that the Commissioner shall establish procedures under which a person who does not own an automobile and who does not live in a car owning family may reject the limitations on tort set forth in this Act.

92. Under this provision, as in Kentucky, one is covered by personal protection insurance with its restrictions on tort claims unless one opts out of the personal protection system. KY. REV. STAT. ANN. § 304.39-060(4) (Baldwin 1989).

93. An uninsured motorist can only claim for property damage in excess of \$10,000 and for economic damages; he cannot claim for noneconomic damages against either a fault-based insured or a personal protection insured. These limitations do not, however, apply if either a fault-based or personal protection insured was driving under the influence of alcohol or illegal drugs or was guilty of intentional misconduct. Sections 11(g) and 12(c) of Model Bill. *See also supra* note 26.

94. This provision allows insurers to sell policies which include both standard liability coverage and personal protection coverage.

95. *See supra* note 26 and accompanying text.

claim in tort for either economic or noneconomic damages against a person who has rejected tort limitations. A person who rejects tort limitations shall not collect personal protection benefits unless he or she has revoked his or her rejection under subsection (d) of this section.

(d) A rejection of tort limitations shall be effective on the date prescribed by rule by the Commissioner, and the rejection applies to any motor vehicle accident occurring after that date. The rejection remains effective until it is revoked in writing on a form prescribed by the Commissioner. The revocation is effective on the date prescribed by rules adopted by the Commissioner and remains effective until it is withdrawn in a manner prescribed by the Commissioner. The rejection form is a public record.

(e) The Commissioner shall establish and maintain a program designed to assure that consumers are adequately informed about the comparative cost of personal protection insurance and liability insurance for those persons who choose to reject limitations on tort rights and liabilities, as well as the benefits, rights and responsibilities of insureds under each type of insurance.

(f) A person who selects personal protection coverage or who rejects tort limitations on a form approved by the Commissioner is bound by that choice and is precluded from claiming liability of any party based on being inadequately informed as to the coverage or rejection. This restriction also applies to relatives residing in the same household as well.⁹⁶

(g) Each motor vehicle insurer issuing motor vehicle liability insurance in this state may require that all policies within a household be either personal protection policies or liability policies which satisfy the financial responsibility laws of this state.⁹⁷

(h) To further insure preservation of the right to reject the limitations on tort rights contained in this Act, the Commissioner shall establish by rule procedures whereby any person who does not own a motor vehicle and who is not a resident relative of such an owner may, after sustaining accidental bodily injury, execute a form prescribed by the Commissioner for rejecting such limitation within thirty days after the date of notification of the right of rejection.

SECTION 13. Personal Protection Benefits and Causes of Action for Injury.⁹⁸

No subtraction is made against personal protection benefits due because of the value of a cause of action for injury, except that after recovery is realized under such cause of action, a subtraction is made to the

96. To avoid the problem of insurers or others facing claims by insureds asserting after the fact that the latter were inadequately informed about the possible choices, the bill provides that if one provides an insured with a written description of the choice, conforming to terms specifically prescribed by the state Department of Insurance, one will be immune from claims for inadequately informing an insured as to the available choices.

97. Without this provision an insurer might find it administratively burdensome to have different options made by individual family members.

98. This provision coordinates common law claims based on fault and claims for personal protection benefits. For its origins, see R. KEETON & J. O'CONNELL, *supra* note 38, at 307, 402-04.

extent of the net recovery, exclusive of reasonable attorney fees and other reasonable expenses incurred in effecting the recovery. If personal protection benefits have already been received, the recipient thereof shall repay to the insurer paying personal protection benefits out of such recovery a sum equal to the personal protection benefits received but not more than the realized net recovery, and the insurer shall have a lien on the recovery to this extent. Any remainder of the net recovery from such a cause of action applies periodically against loss as it accrues, until an amount equal to the net recovery under such a cause of action has been subtracted.

SECTION 14. Periodic Payments of Personal Protection Benefits.⁹⁹

(a) Personal protection benefits are payable monthly as loss accrues. The benefits are overdue if they are not paid within 30 days after the personal protection insurer receives reasonable proof of the fact and the amount of loss sustained, except that a personal protection insurer may accumulate claims for a period not to exceed one month, in which case benefits are not overdue if they are paid within twenty days after the period of accumulation. If reasonable proof is not supplied for the whole claim, the amount supported by reasonable proof is overdue if it is not paid within thirty days after the proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is overdue if it is not paid within thirty days after the proof is received by the insurer. To determine the extent to which any benefits are overdue, a payment is treated as made on the date a draft or other valid instrument is mailed or, if not so posted, the date of delivery. The personal protection insurer may pay personal protection benefits to a person who supplies necessary products, services, or accommodations to the injured person. All overdue payments bear interest at the rate of 150 percent of the prime rate in effect at the time the payments became overdue.

(b) If overdue benefits are recovered against a personal protection insurer or are paid by a personal protection insurer, the provisions of section 11(e) pertaining to expenses and attorney fees apply. The remedy set forth in this section is the exclusive remedy for an insurer's failure to pay or delay in paying personal protection benefits or for conduct of an insurer rising out of the manner in which the insurer denied or delayed payment.¹⁰⁰

SECTION 15. Assignment or Garnishment of Personal Protection Benefits.¹⁰¹

99. Personal protection benefits are payable monthly, as the losses accrue. If they are not paid to the victim or the provider of service within 30 days after the insurer receives reasonable proof of the fact and amount of loss sustained, the benefits are overdue. (Alternatively, benefits are overdue if they are accumulated for up to one month if they are not paid within 20 days after the period of accumulation.)

The section further provides that "[a]ll overdue payments bear interest at the rate of eighteen per cent per annum." If overdue benefits are recovered from an insurer or paid by an insurer, the insurer shall also pay reasonable attorney's fees.

100. This section is designed to eliminate actions for bad faith or for punitive damages as additional remedies to that provided in this section.

101. Subsection (a) of this section excepts personal protection benefits, except medical benefits, from garnishment, attachment, execution, or other process to the extent wage or earnings are exempt. Subsection (b) provides

(a) Personal protection benefits, except medical benefits, are exempt from garnishment, attachment, execution or any other process or claim to the extent that wages or earnings are exempt under any applicable law.

(b) An agreement for assignment of any right to personal protection benefits payable in the future, except for medical benefits, is unenforceable except to the extent that the benefits are for the cost of products, services, or accommodations provided or to be provided by the assignee or that the benefits are for loss of income from work or replacement services and are assigned to secure payment of alimony, maintenance, or child support. Pain and suffering coverage benefits may be assigned.

SECTION 16. Cancellation or Nonrenewal Prohibited; Penalty.¹⁰²

An insurer shall not cancel or refuse to renew the policy or increase the premium of an insured solely because of a claim for personal protection benefits or collision damage to the insured vehicle, unless the insured caused the accident in whole or in part. The Commissioner may impose a civil penalty of up to 1,000 dollars for each violation of this section, such penalty to be exclusive of all other remedies provided by law.

SECTION 17. Limitation of Actions.¹⁰³

Subject to any arbitration under section 27, if no personal protection benefits have been paid, a person may bring an action against the personal protection insurer not later than two years after the accidental bodily injury occurred. If personal protection benefits have been paid, a person may bring an action to recover further benefits not later than two years after the last payment of benefits.

SECTION 18. Mental and Physical Examinations.¹⁰⁴

(a) If the mental or physical condition of an injured person is material to any claim for past or future personal protection benefits, the injured person shall submit to reasonable mental or physical examinations by a physician or physicians designated by the insurer. The examinations shall

that any agreement to assign the payment of future personal protection benefits is unenforceable, with limited exceptions.

One of the objectives of this Act is to pay benefits periodically . . . to sustain the person suffering loss as expenses are accrued and, incidentally, to reduce the chances that payments will be applied to improvident purposes. This section prevents that objective from being circumvented by assignment of the right to benefits for future loss. Two types of assignments which are not inconsistent with this objective are authorized . . . (1) allows a person to satisfy familial support obligations through an assignment of rights to benefits for work loss . . . (2) allows an injured person to secure needed products, services and accommodations by authorizing assignment of benefits to hospitals, physicians, druggists and others providing those needs.

UMVARA, *supra* note 46, § 29 commentary, at 317.

102. This section provides that an insurer may not cancel or fail to renew a policy, nor may it increase the premium of an insured, solely because he or she filed a claim for personal protection benefits or for collision damage to the insured vehicle. But the insurer may cancel, refuse to renew, or increase the premium if "the insured caused the accident in whole or in part."

103. This section provides a two-year statute of limitation for claims for personal protection benefits. Such an action must be brought against a personal protection insurer within two years after the accident or not later than two years after the last payment of benefits.

104. This section permits personal protection insurers to require reasonable mental or physical examinations at their own expense if the mental or physical condition of an injured person is material to any claim for past or future personal protection benefits.

take place at a reasonably convenient time and location. A personal protection insurer may include provisions of this nature in a personal protection policy.

(b) If after a request by a personal protection insurer a person unreasonably refuses to undergo mental or rehabilitation services payable by the insurer, the insurer, on written notice, may suspend all future benefits until the person complies with the request.

SECTION 19. Verification of Entitlement to Benefits.¹⁰⁵

(a) On request by a personal protection insurer, an employer shall provide information on a form approved by the Commissioner regarding an employee who has filed a claim for personal protection benefits.

(b) Every physician or other health care provider, including but not limited to a hospital, clinic, or other medical institution providing, before or after an injury resulting from a motor vehicle accident upon which a claim for personal protection benefits is based, any products, services, or accommodations in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury shall, if requested to do so by the personal protection insurer against whom the claim has been made, furnish a written report of the history, condition, treatment, and the dates and costs of such treatment, of the injured person. Such information shall be provided together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the injury sustained and identifying which portion of the expenses for such treatment or services were incurred as a result of such injury. Every such physician or other health care provider, hospital, clinic, or other medical institution shall also promptly produce and permit the inspection and copying of its records regarding such history, condition and treatment, and the dates and costs of treatment. The sworn statement required under this section reads as follows:

"Under penalty of perjury I declare that I have read the foregoing and the facts alleged are true, to the best of my knowledge and belief."

(c) No cause of action for violation of a physician-patient privilege or invasion of the right of privacy is allowed against any physician or other health care provider, hospital, clinic, or other medical institution complying with the provisions of this section. The person requesting records and a sworn statement under this section shall pay all reasonable costs connected therewith.

(d) A court may order discovery of any records under this section.

SECTION 20. Assigned Claims Plan.¹⁰⁶

105. This section provides for verification of entitlement to personal protection benefits. Subsection (a) deals with information from employers, and subsection (b) deals with health care providers. Subsection (c) authorizes a court to order discovery of any records described in this section.

106. This section requires all personal protection insurers and qualified self-insurers to organize and maintain an assigned claims plan to assure that personal protection benefits are available to all persons.

The policy of the Act contemplates that with a few specified exceptions, all who are subject to [personal protection coverage] . . . and injured in motor vehicle accidents are entitled to prompt payment of [personal protection] . . . benefits. To assure that this goal is fully accomplished in all cases, it is necessary to

(a) Insurers and qualified self-insurers authorized to provide personal protection shall organize, participate in, and maintain an assigned claims plan to provide basic personal protection benefits to any person who is injured as a result of a motor vehicle accident if the injured person is not:

(1) an insured under any personal protection or liability policy applicable to the accident, unless personal protection benefits are unavailable, in whole or in part, because of financial inability of an insurer to fulfill its obligations;

(2) an uninsured motorist; or

(3) occupying an uninsured motor vehicle owned or available for the regular use of a relative residing in the same household.

(b) The assigned claims plan shall adopt such rules and agreements for the operation of the plan and for the equitable distribution of costs as are approved by the Commissioner. A claim brought under the assigned claims plan shall be assigned to an insurer, in accordance with such rules and agreements, and thereafter such insurer has the rights and obligations it would have had if, prior to the assignment, it had issued a policy providing personal protection applicable to the loss. A person who accepts personal protection benefits under the assigned claims plan has the rights and obligations he or she would have had under a policy issued to him or her which provided personal protection benefits.

(c) If a claim qualifies for assignment under this section, the assigned claim plan and the insurer to whom the claim is assigned are subrogated to the rights of the claimant against any person who is liable for the loss and against any insurer, or other person legally obligated to provide personal protection benefits to the injured person, for benefits provided by the assignment.

(d) No personal protection benefits shall be paid to an injured person if such person is ineligible for personal protection benefits as provided in section 6.

SECTION 21. Fraudulent Claims; Penalty.¹⁰⁷

A person, including an insurer, who with intent to injure, defraud or deceive, prepares, presents or causes to be presented any written or oral statement in connection with a claim for payment or other benefit which the person knows to be false, misleading or incomplete concerning a material fact is subject to a civil penalty of not to exceed 10,000 dollars.

provide a residual source of benefits for those where a responsible insurer, self-insurer, or obligated government cannot be identified as an applicable source of immediate benefits. The assigned claims plan in which all [insurers providing personal protection] . . . coverage in the State, [including self-insurers] . . . will be required to participate, is the residual benefit source provided by the Act. Through it the losses and expenses incurred in covering the residual situations indirectly are spread over the entire [personal protection insurance community] . . . of the State.

UMVARA, *supra* note 46, § 19 commentary at 304.

107. This section provides for a civil penalty of not to exceed \$10,000 for any person who makes a written or oral statement with intent to defraud in connection with a claim that the person knows is false or misleading. Note this section applies to both claimants and insurers with regard to both personal protection and liability payment.

SECTION 22. Nondiscrimination in Fees for Medical Services.¹⁰⁸

A physician or other health care provider, including but not limited to a hospital, clinic or other health care institution rendering treatment to an injured person, may charge only a reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for the products, services and accommodations in cases not involving insurance.

SECTION 23. Managed Care.¹⁰⁹

A personal protection insurer, with the approval of the Commissioner, may use managed care systems including, but not limited to, health maintenance organizations¹¹⁰ and preferred provider options,¹¹¹ and may require an injured person to obtain health care through a managed care system designated by the personal protection insurer if the injured person opts at the time of purchase of personal protection coverage to be subject to a managed care system at an appropriately reduced premium.¹¹²

SECTION 24. Safety Equipment.¹¹³

The Commissioner shall adopt rules which encourage personal protection insurers to institute incentives for personal protection insureds to install, maintain and make use of injury reducing devices such as seat and harness belts, air bags and child restraint systems.¹¹⁴

108. This section prohibits a physician, hospital, clinic or other health care provider from charging an injured person any amount that exceeds the amount the person or institution "customarily charges for the products, services and accommodations in cases not involving insurance." This section, therefore, is designed to prevent overcharging a personal protection claimant simply because insurance is the source of payment.

109. This section authorizes a personal protection insurer to use managed care systems (such as a health maintenance organization. *See supra* note 97) and authorizes an insurer to require an injured person to obtain health care through such a system "if the injured person opts at the time of purchase of personal protection coverage to be subject to a managed care system at an appropriately reduced premium."

110. [A health maintenance organization (HMO) is an organization providing health care which] . . . ordinarily has a closed group of physicians (and sometimes other health care professionals) along with either its own hospital or allocated beds in one or more hospitals. Patients "join" an HMO, which agrees to provide "all" the medical or hospital care they need, under a contract stipulating the limits of the service, for a fixed, predetermined fee.

V. SLEE, HEALTH CARE TERMS, 60 (1986).

111. [A preferred provider option (PPO) is a] . . . form of insurance in which certain physicians are designated by a third party payer [such as an employer or insurer] . . . as preferred providers when the payer concludes that these physicians are the most cost-effective. When a beneficiary elects to receive care from these physicians, the physicians' charges are paid in full—there is no additional charge to the beneficiary. The beneficiary may elect to obtain care from other physicians, but if she does, there is a financial penalty to the beneficiary—she must pay part of the charges.

Id. at 110.

112. More and more health insurance companies are employing such managed care systems (*see supra* note 109) to control health care costs; this provision allows personal protection insurers also to use them.

113. This section directs the Commissioner of Insurance to adopt rules to encourage personal protection insurers to institute incentives for their insureds to install injury reducing devices such as air bags and child restraint systems.

114. [The Act gives motorists a choice between being paid under tort liability insurance or personal protection and] . . . has the additional advantage of encouraging motorists to purchase automobile safety devices such as passive restraint equipment. Traditional auto insurance does not offer this advantage. For example, air bags installed in an automobile reduce the risk of death or injury in a collision. Widespread use of air bags would cut insurance costs by reducing the amount of claims brought by accident victims. If these savings could be passed on in the form of lower premiums to individual motorists who install air

SECTION 25. Rules.¹¹⁵

The Commissioner may adopt additional rules for effective administration which are fair, equitable and consistent with the purpose of this Article. The Commissioner shall also establish, within the Department of Insurance, a compliance unit which shall monitor all complaints against insurers, health care providers, and attorneys arising out of the provision of personal protection benefits. The Commissioner shall report to the legislature, at least annually, on the nature of the complaints, the penalties levied against insurers, and the final disposition of the complaints. The report, which shall identify parties by name, is a public record available on request by any member of the public.

SECTION 26. Cost of Living Adjustment.¹¹⁶

Every two years, on the anniversary of the effective date of this Act, the Commissioner shall report in writing to the legislature on the effect of changes in the relevant components of the cost of living on levels of benefits, limits of liability and deductibles mentioned in this Article.

SECTION 27. Arbitration.¹¹⁷

Any dispute with respect to personal protection coverage between an insurer and an injured person, or the dependents of such person, shall be submitted to arbitration. Such dispute either shall be submitted to the American Arbitration Association, or be submitted in the following manner: Upon the request for arbitration being made by either party, each party to the dispute shall select an arbitrator and the two arbitrators so named shall select a third arbitrator. The written decision of any two arbitrators is binding on each party. If arbitrators are not selected within forty-five days from such request, either party may require that such arbitration be submitted to the American Arbitration Association.

SECTION 28. Out-of-State Vehicles.¹¹⁸

bags, motorists would have a financial incentive to purchase such safety equipment. In essence, the lower insurance costs could be used to finance the safety equipment.

Unfortunately, no such incentive exists with traditional [tort liability] insurance. Under traditional insurance, accident victims are compensated by the insurer of the driver who caused the accident. Therefore, any savings in insurance costs from the use of air bags accrues to the insurer of the motorist at fault rather than to the insurer of the owner of the air bag-equipped car. The insurer of the air bag-equipped car is unable to pass on any cost savings to the motorist who installed the air bags. Consequently, traditional insurance does not encourage the installation of [injury reducing] . . . equipment.

Allowing individual motorists to choose [personal protection] . . . insurance . . . would solve this problem. Motorists who choose [personal protection] . . . insurance would have a strong financial incentive to buy safer cars. Insurance companies would presumably offer lower premiums to [such] . . . insureds who install airbags because the savings created by their use would accrue to [such a] . . . motorist's insurer rather than to another insurance company.

O'Connell & Joost, *supra* note 3, at 88 n. 74.

115. This section contains standard language authorizing the Commissioner of Insurance to adopt rules for the administration of this Article.

116. This section specifically authorizes the Commissioner to report to the legislature every two years "on the effect of changes in the cost of living on levels of benefits, limits of liability, and deductibles mentioned in this article."

117. This section authorizes a personal protection insurer to include an arbitration clause in any personal protection policy as a way of resolving disagreements.

118. This section requires each insurer authorized to do business in the state to file an approved form with the Commissioner of Insurance stating that any contract of liability insurance, regardless of where issued, which

(a) Each insurer authorized to transact business or transacting business in this state shall file with the Commissioner a form approved by the Commissioner which states that any contract of motor vehicle liability insurance, wherever issued, covering the maintenance or use of a motor vehicle while the motor vehicle is in this state, is deemed to satisfy section 4 once the vehicle has been continuously present in this state for thirty days unless the named insured has rejected the limitations on tort rights and liabilities under section 12.

(b) If a person is entitled to personal protection benefits or their equivalent under the requirements of more than one state, the person shall elect to recover under the laws of one state. The election represents the exclusive source of recovery of all personal protection benefits, or their equivalent, paid or payable under the financial responsibility requirements of that or any other state.

SECTION 29. Terms, Conditions and Exclusions.¹¹⁹

All insurance coverages provided under this Article are subject to such terms, conditions and exclusions which have been approved by the Commissioner.

SECTION 30. Rate Differential.¹²⁰

(a) The statewide average premium to be charged by each insurer for the basic personal protection policy and the property damage liability insurance required by section 4 and section 11(f) during the first year following the effective date of the Act shall be at least twenty percent less than such insurer's statewide average policy premium in effect on July 1, 199x for the insurance required by the financial responsibility laws of this state, including uninsured motorist coverage. Under rules prescribed by the Commissioner, each insurer shall establish a fair, practical and nondiscriminatory plan for refunding or otherwise crediting the appropriate cost savings required by this section to those whose policy conforms to the requirements of section 4.¹²¹

(b) The state assigned risk plan¹²² shall adopt a rating system which provides premium reductions from the rates established by the plan after the effective date of this section which are comparable to those required

covers a motor vehicle in the enacting state will convert to personal protection insurance (unless the named insured has rejected tort limitations) once the vehicle has been continuously in the state for 30 days.

119. This section provides that all insurance coverages provided pursuant to this article are subject to approval by the Commissioner of Insurance.

120. This section requires a rate reduction. The statewide average premium to be charged by each insurer for personal protection and the required property damage liability insurance during the first year following the effective date of this Act shall be at least 20% less than such insurer's average statewide policy premium in effect on the July 1 prior to the Act's January 1 effective date, for the insurance required by the state's financial responsibility law. The Commissioner of Insurance is directed to administer and enforce this section. As part of this power, he is authorized to provide an appropriate remedy for any charges in excess of those permitted by this section. See *supra* notes 30-31 and accompanying text.

121. See *supra* notes 30-31 and accompanying text.

122. An assigned risk plan is a plan whereby a motorist whose voluntary application for insurance has been lawfully denied or whose insurance has been lawfully cancelled is insured by a company to which his application is assigned under some principle of rotation or proration among insurers doing business in the state.

by this section for the rating systems established by or on behalf of individual insurers.

(c) The Commissioner shall administer and enforce this section subject to judicial review. The Commissioner may require that insurers provide appropriate information about their rating systems in effect on the effective date of this section or at any time within two years thereafter. If the Commissioner finds that an insurer has failed to comply with this section, the Commissioner may order the insurer to adopt rates in compliance with this section and to provide an appropriate remedy for any charges in excess of those permitted by this section.

SECTION 31. Severability and Constitutionality.¹²³

If any provision of this Act or the application thereof to any person or circumstance is held to be unconstitutional or otherwise invalid, the remainder of this Act and the application of such provision to other persons or circumstances are not affected thereby, and it is to be conclusively presumed that the legislature would have enacted the remainder of this Act without such invalid or unconstitutional provision, except that if section 11(a), section 12(a) or section 12(d) is found to be unconstitutional or invalid it is to be conclusively presumed that the legislature would not have enacted the remainder of this Act without such limitations, and the entire Act is invalid. If section 11(a) is found to be unconstitutional or invalid, personal protection insurers have no obligation to pay personal protection benefits with respect to accidents occurring on or after the date of the finding of such unconstitutionality or invalidity and, in addition, are subrogated to all of the rights of personal protection insureds for all previous such benefits paid.

SECTION 32. Declaratory Judgment.¹²⁴

In addition to the provisions of section 31 and section 29, the legislature finds and declares that questions of law with respect to the constitutionality of this Act should be resolved with expedition prior to such time as its mandatory provisions take effect in order to avoid disruption of the orderly implementation of its provisions. Therefore, the legislature finds that the remedy of declaratory judgment to determine the constitutionality of the provisions of this Act should be immediately made available to determine those important questions, in order to avoid confusion in the event this Act is declared unconstitutional after the effective date of this

123. This section describes what happens if any provision of this initiative, or its application to any person or circumstance, is held unconstitutional. In most cases, the remainder of the Act and its application to others are not affected by a holding of unconstitutionality. But if the limitations on the right to sue in tort, on the part of those who are covered by personal protection insurance, or the rejection of tort limitations by those who choose to remain in the tort system are held invalid, "it is to be conclusively presumed that the legislature would not have enacted the remainder of this Act without such limitations, and the entire Act is invalid." Further, insurers have no obligation to pay future personal protection benefits, and insurers who have paid such benefits in the past have a right to assert tort claims in subrogation against those hitherto thought exempt from tort claims. But a declaration of invalidity of other clauses does not affect the remainder of the Act.

124. This section declares that the remedy of declaratory judgment is available with respect to questions of law regarding this Act. Specifically, any resident of the state is authorized to bring an action for a declaratory judgment to determine the constitutionality of the Act's provisions.

section. Therefore, any resident of the state is authorized to forthwith bring an action for a declaratory judgment in the _____ court, for _____ County, against the Commissioner to determine the constitutionality of this Act's provisions, with reservation of questions of law for the advice of the Supreme Court as provided by law.

SECTION 33. Effective Date.

This Act takes effect on January 1, 199y and applies to the use or operation of motor vehicles within this state on and after such date.

APPENDIX¹²⁵

FINDINGS

The present average loss cost in Arizona for the financial responsibility auto liability coverage (including uninsured motorist) is approximately 197 dollars. Our estimated loss cost for the basic personal protection policy is approximately 84 dollars (assuming 85 percent of the insured population elects the personal protection policy), or a difference of 57 percent:

Coverage	Present FR ¹²⁶ Limits Loss Cost	Estimated Personal Protection Policy Average Loss Cost (% Electing Personal Protection Policy)			
		0%	50%	85%	100%
BI ¹²⁷	\$119.34	\$109.94	\$ 5.97	\$ 5.97	\$ 5.97
PD ¹²⁸	60.84	52.49	32.59	18.66	3.04
PIP ¹²⁹			58.10	58.10	58.10
UM ¹³⁰	17.09	17.09	.85	.85	.85
Total	\$197.27	\$179.53	\$97.51	\$83.58	\$67.96
% Difference from present		-9.0%	-50.6%	-57.4%	-65.6%

It appears the 20 percent mandated premium reduction referred to in the initiative¹³¹ is fully supported by differences in the expected costs for the personal protection policy relative to the present average costs.

Even if no one elects the personal protection policy, costs will decrease (by approximately 9 percent) as a result of the limitations on recovery for the inju-

125. As indicated in note 11 *supra*, this Appendix is excerpted, with permission from Tillinghast Consulting Actuaries, from an actuarial study conducted by Tillinghast for Project New Start, a group consisting of insurance companies, consumer groups, and government officials. (This and the following footnotes are not part of the Tillinghast report.)

126. "FR" refers to financial responsibility. See *supra* note 56 and accompanying text.

127. "BI" refers to bodily injury liability coverage.

128. "PD" refers to property damage liability coverage.

129. "PIP" refers to personal protection coverage (and might better have been labeled "PP" since the "I" refers to nothing).

130. "UM" refers to uninsured motorist coverage.

131. See *supra* the last paragraph in the beginning note labeled with an asterisk.

ries of motorists that do not have any auto insurance coverage (i.e. uninsured motorists).¹³²

The estimated premium savings on the third party liability coverages is offset to a certain degree by the increased costs of first party physical damage (collision) coverages.¹³³ Damage to a personal protection insured's vehicle, formerly covered under the at-fault party's PD¹³⁴ liability coverage, will now be covered under the collision coverage if another personal protection insured is the at-fault party. If 85 percent of the population insured for physical damage choose the personal protection policy, their physical damage costs will increase approximately 22 percent; hence the physical damage costs for the entire private passenger automobile insurance system would increase by 19 percent.

Using an estimated distribution of insureds by liability limit, and incorporating judgments as to the number of insureds purchasing physical damage coverage (approximately 80 percent), we estimate the private passenger automobile industry's total premium savings (if 85 percent of the insured population chooses the personal protection policy) is approximately 24 percent, or 260 million dollars:

	1988 Industry Premium	Premium Impact	
		<u>Premium Impact</u>	
		<u>%</u>	<u>\$</u>
Liability	\$ 713	-49.5 %	\$-353
Physical Damage	368	+18.9	70
Total	\$1,081	-26.2 %	\$-283

No guarantee can be made that 85 percent of the insured population will choose the personal protection policy; however, we believe it is a reasonable assumption given that it is the default option.

The estimated premium savings will vary by geographic area because of the differences the relative share of liability versus physical damage average premiums bear to the total. Likewise, the impact on an insured's overall premium will depend upon the type of vehicle driven, given that the physical damage premiums vary by vehicle cost, make and model year. In order to demonstrate the range of potential premium savings, the table below presents nine examples of various coverage and limits combinations:

132. See *supra* notes 24 and 28.

133. See *supra* note 60.

134. See *supra* note 128.

Estimated % Reduction in
Liability and Physical Damage¹³⁵ Premiums
for a Personal Protection Insured

<u>BIPD¹³⁶</u> <u>Limits</u>	<u>Line of</u> <u>Coverage</u>	<u>Statewide</u>	<u>Phoenix</u>	<u>Tucson</u>
15/30/10	Liability	-57.4%	-59.8%	-57.5%

Assumes that residual BI coverage not purchased¹³⁷

50/100/25	Liability	-50.4	-52.5	-50.4
	Phys. Dam.	+18.4	+21.4	+19.5
	Total	-17.3	-20.0	-17.8

Assumes purchase of residual BI coverage¹³⁸ for a \$14,000 car, 1988 model year

100/300/25	Liability	-52.8	-54.6	-52.8
	Phys. Dam.	+13.3	+15.5	+14.1
	Total	-17.8	-20.4	-18.3

Assumes purchase of residual BI coverage¹³⁹ for a \$20,000 car, 1990 model year

These premium reductions assume that the relative rate adequacy will remain unchanged from current conditions.

Private passenger automobile premiums have historically been inadequate in Arizona, as evidenced by the operating ratios (developed by the NAIC)¹⁴⁰ presented in the following table:

Arizona Private Passenger Automobile
Operating Profit/Loss (% of Earned Premium)¹⁴¹

<u>Year</u>	<u>Liability</u>	<u>Physical Damage</u>	<u>Combined</u>
1984	- 6.5 %	+ 2.5 %	-3.2 %
1985	-13.1	3.8	-6.6
1986	-11.3	8.5	-4.0
1987	- 6.4	7.7	-1.5
1988	- 5.2	5.9	-1.4

Thus, actuarially indicated rate changes for the period subsequent to the effective date of the consumer choice initiative would need to recognize the degree of inadequacy of pre-existing rates as well as the cost savings anticipated from the initiative.

135. See *supra* note 60 and accompanying text.

136. See *supra* notes 127-28.

137. See *supra* notes 18, 21, 24 and accompanying text. Residual liability refers to the exposure to liability mentioned therein.

138. *Id.*

139. *Id.*

140. "NAIC" refers to the National Association of Insurance Commissioners.

141. Earned premium refers to that portion of the premium that has been "used up" during the policy's term; e.g., when a policy has been in effect for six months, half the total premium has been "earned."

